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No. 75-635

In the Supreme Court of the United States

OCTOBER TERM, 1975

DANIEL A. DONOVAN, CHARLES BRENNICK AND JOHN BRENNICK, CO-PARTNERS doing business under the trade name and style of DANIEL A. DONOVAN d/b/a NEW FAIRVIEW HALL CONVALESCENT HOME, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 520 F. 2d 1316. The decision and order of the Board (Pet. App. 18a-30a) are reported at 206 NLRB 688.[1]

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[1] The petition reprints only excerpts from the Administrative Law Judge's decision. The full decision is reprinted in

JURISDICTION

The judgment of the court of appeals (Pet. App. 16a-17a) was entered on August 7, 1975. The petition for a writ of certiorari was filed on October 29, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the National Labor Relations Board properly ordered the employer to recognize and bargain with the union as a remedy for its violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act.

STATUTE INVOLVED

Most of the relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) ,are set forth at Pet. App. 64a-66a.

Section 8(a)(3) of the Act provides:

> It shall be an unfair labor practice for an employer—
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *.

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the Joint Appendix (J.A. 66A-224A) in the court below. A copy has been lodged with the clerk.

STATEMENT

Daniel Donovan, Charles Brennick, and John Brennick are co-partners doing business under the trade name "Daniel A. Donovan d/b/a New Fairview Hall Convalescent Home." The Company is a licensed proprietary nursing home and extended care facility located in New Haven, Connecticut (J.A. 71A-72A).

The Union [2] held its first organizational meeting in February 1971. After obtaining authorization cards from 39 of the 58 Company's service and maintenance employees, the Union requested the Company to recognize it as the employees' bargaining representative. On March 2, 1971, after the Company had failed to respond, the Union mailed authorization cards from 30 employees to the Board and petitioned it for an election (J.A. 73A-74A, 78A-80A). On March 11 the Company rejected the Union's second request for recognition (J.A. 93A).

Meanwhile, beginning in mid-February 1971, the Company made a concerted effort to undermine the Union's organizational activities. On numerous occasions the Company threatened employees with loss of their jobs if they continued to support the Union, and with loss of benefits, including lunch periods and breaks, if the Union were allowed into the facility; solicited employees to negotiate grievances directly with the Company rather than through the Union;

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[2] Local 1199, Drug and Hospital Union a/w National Union of Hospital and Nursing Home Employees, Retail, Wholesale and Department Store Union a/w AFL-CIO.

and coercively interrogated employees. In addition, the Company promised a pay increase to an employee for refusing to support the Union and withheld an increase from a Union supporter (J.A. 193A-209A; Pet. App. 19a).

On May 6, 1971, the Union struck in support of an employee, a Union activist, whom the Company had discharged. At least 51 unit employees participated in the strike (J.A. 127A-128A).[3] After the strike ended in September the Company renewed its coercive activity against those who had supported the Union. The Company refused immediately to reinstate 18 strikers to available jobs and thereafter delayed their reinstatement when job vacancies arose. The Company declined to reinstate several strikers to substantially equivalent jobs, assigning one former striker to a more onerous position and denying two others full reinstatement. Three months after the strike, for the first time and without explanation, the Company awarded Christmas bonuses to the unit employees (J.A. 175A-192A, 128A-129A; Pet. App. 19a-21a).

During the four-month strike a few striking employees made threats and engaged in name-calling from the picket line against non-striking employess. Striking employees also followed cars twice, hit nonstrikers' cars with fists and pebbles two or three times as they passed the picket line, unsuccessfully

[3] The strike was ultimately determined to be an economic strike (J.A. 209A).

attempted to block entrance to the Company's premises, broke the windshield of one nonstriker's automobile, and once unsuccessfully attempted forcible entry onto company premises. There were no physical assaults upon employees or supervisory personnel. The nonstriking employees continued to report for, and were able to, work during the strike (Pet. App. 22a).

Upon charges filed by the Union, the Board found that the Company's efforts to undermine the Union violated Section 8(a)(1) of the Act (J.A. 217A-218A; Pet. App. 19a). The Board also found that the Company's refusal immediately to reinstate 18 strikers, the subsequent delay in reinstating them as jobs became available, the refusal to offer full reinstatement to three of the strikers, and the refusal to reinstate two strikers who had engaged in minimal misconduct during the strike violated Section 8(a)(3) of the Act (J.A. 218A; Pet. App. 19a-21a).

The Board found that the Union had obtained valid authorization cards from a majority of the Company's employees by the time it made its initial request for recognition, that the Union retained this majority when it made its subsequent request for recognition, and that the Company's refusal to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act (Pet. App. 21a). The Board concluded that the Company's "pervasive unlawful conduct tended to undermine and destroy the Union's majority support and was of such a severe nature as to make a fair election doubtful, if not

impossible" (Pet. App. 23a). The Board finally concluded that the acts of misconduct engaged in by some strikers were not so substantial as to warrant the withholding of an otherwise appropriate bargaining order (Pet. App. 22a-23a). The Board therefore ordered the Company to bargain with the Union upon request (Pet. App. 24a).

The court of appeals sustained the Board's findings and enforced its order (Pet. App. 1a-15a).

ARGUMENT

Under the principles of *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, the Board is entitled to direct an employer to bargain with a union where, as in the instant case, the union has a card majority [4] and the employer engages in serious unfair labor practices that makes it improbable that a fair election could be held. Petitioner's assertions to the contrary notwithstanding, in this case the Board fully scrutinized the nature, extent, and effect of the Company's unfair labor practices on employee rights before determining that a bargaining order was appropriate.

[4] Petitioner does not challenge the validity of the authorization cards at the time they were offered to the Company as proof of Union majority. Its contention (Pet. 9-10) that the Union's alleged misconduct renders the cards unreliable as indicators of Union support is belied by the fact that 51 of the 58 unit employees supported the Union strike in the face of massive employer unfair labor practices, and that no employee revoked, or attempted to revoke, his authorization.

For example, the Board found that petitioner's "pervasive unlawful conduct tended to undermine and destroy the Union's majority support and was of such a severe nature as to make a fair election doubtful, if not impossible" (Pet. App. 23a). And, as the Board added, "the effects of the [Company's] discriminatory discharges, its failure promptly to reinstate strikers, its parade of 8(a)(1) violations, and its unlawful grant of bonuses have * * * so indelibly imprinted in its employees' consciousness both the fear of retaliation against legitimate concerted activity and the available rewards for refraining therefrom that no free election can be held here" (Pet. App. 23a, n. 7).

Accordingly, the basic question presented by the petition (Pet. 10-13) is whether the Board departed without just cause from the course it followed in *Laura Modes Co.*, 144 NLRB 1592 (1963), and *Allou Distributors, Inc.*, 201 NLRB 47 (1973), which held that misconduct by the union may warrant withholding a bargaining order that would otherwise be appropriate.[5] The Board found (Pet. App. 22a), and the court below agreed (Pet. App. 8a-14a), that the situation here is factually distinguishable. Unlike the situations in *Laura Modes*

[5] The Board did not "balance" (see Pet. 8-9) the employer's misconduct against that of the Union in determining whether a bargaining order would be appropriate. Only after conducting a proper *Gissel* inquiry did the Board consider whether an otherwise proper bargaining order should be withheld in order to penalize or deter Union misconduct.

and *Allou*, the strike misconduct in the instant case involved only a handful of Union members and occurred only sporadically during the lengthy strike; there were no physical assaults on employees or supervisors by Union agents; the Union did not seek to use its own misconduct as a means of extracting recognition outside the Board's election processes. In these circumstances, the Board did not abuse its broad remedial authority in concluding that the Union misconduct did not foreclose a bargaining order.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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NORTON J. COME,
Deputy Associate General Counsel,

SANDRA SHANDS ELLIGERS,
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DECEMBER 1975.

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[6] As the court below noted (Pet. App. 12a-13a), the excesses by the Union subject it to "appropriate remedies" under the Act. See Pet. App. 31a-32a.

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